

1 JEDEDIAH WAKEFIELD (CSB No. 178058)
 2 jwakefield@fenwick.com

3 JENNIFER L. KELLY (CSB No. 193416)
 4 jkelly@fenwick.com

5 FENWICK & WEST LLP
 555 California Street, 12th Floor
 San Francisco, CA 94104
 Telephone: (415) 875-2300
 Facsimile: (415) 281-1350

6 HENRY Z. CARBAJAL III (CSB No. 237951)
 7 hcarbajal@fenwick.com

8 FENWICK & WEST LLP
 Silicon Valley Center
 801 California Street
 Mountain View, CA 94041
 Telephone: (650) 988-8500
 Facsimile: (650) 938-5200

9 Attorneys for Plaintiff
 10 NGMOCO, INC.

11 UNITED STATES DISTRICT COURT
 12
 13 NORTHERN DISTRICT OF CALIFORNIA
 14
 15 SAN FRANCISCO DIVISION

16 NGMOCO, Inc., a Delaware corporation,

17 Plaintiff,

18 v.

19 GAMELOFT, S.A.,

20 Defendants.

Case No.

COMPLAINT FOR DECLARATORY RELIEF;
 DEMAND FOR JURY TRIAL

HRL

1384

CV 09

1 Plaintiff ngmoco, Inc. ("ngmoco") for its Complaint alleges as follows:

2 **THE NATURE OF THE ACTION**

3 1. As virtually any 3-year-old with a set of building blocks can attest, no one owns
4 the idea of a "stacking" game, where the object is to see how high one can build a tower before it
5 falls. In this action for declaratory judgment and attorneys' fees, ngmoco seeks to eliminate any
6 doubt that its successful "Topple" video game, released in October 2008, and the sequel, "Topple
7 2," released in March 2009, do not infringe on any copyright in and to the game "Wonder
8 Blocks" allegedly owned by defendant Gameloft, S.A. ("Gameloft"), which has demanded that
9 ngmoco stop distributing its Topple games.

10 2. Having been threatened with legal action, ngmoco seeks a declaration from this
11 Court that Topple and Topple 2 do not infringe on any copyrights owned by Gameloft, because
12 any similarities between Topple and Topple 2 compared with Wonder Blocks are driven by the
13 wholly unprotectable idea of stacking assorted blocks as high and as creatively as one can before
14 they fall, and that this unprotectable idea will necessarily yield similarities of ideas, game
15 procedure and functions, materials in the public domain, *scenes á faire* and other trivial and
16 random similarities that cannot give rise to a copyright claim. Plaintiff ngmoco seeks declaratory
17 judgment on these bases (and the additional bases described herein) so that there will be no
18 controversy clouding the right of ngmoco or others to continue distributing Topple, Topple 2 or
19 ancillary products.

20 **JURISDICTION AND VENUE**

21 3. This action arises under the Declaratory Judgment Act, 28 U.S.C. § 2201 and the
22 Copyright Act, 17 U.S.C. § 101, *et seq.* This Court has subject matter jurisdiction over the claims
23 asserted herein under 28 U.S.C. §§ 1331 and 1338(a).

24 4. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 in that a
25 substantial part of the events giving rise to the claims herein occurred in this judicial district, and
26 that Gameloft is subject to personal jurisdiction in this district by virtue of its transacting, doing
27 and soliciting business in this district.
28

INTRADISTRICT ASSIGNMENT

5. As this action seeks declaratory relief as to an intellectual property issue, it is subject to district-wide assignment pursuant to Civil L.R. 3-2(c). This action arises in San Francisco County, where Plaintiff ngmoco is located and where a substantial part of the actions, statements, and threats described below were directed.

PARTIES

6. Plaintiff ngmoco is a company organized and existing under the laws of the state of Delaware, licensed to do business in California, with its principal place of business in San Francisco, California.

7. Plaintiff ngmoco is informed and believes, and on that basis alleges, that Defendant Gameloft, S.A. is a citizen of, and a corporation organized under the laws of, the Nation of France, with a principal place of business located at 14, rue Auber-75009, Paris, France. Upon information and belief, Gameloft is an international publisher of video games for mobile phones and consoles. Upon information and belief, Gameloft distributes its games in the United States and the state of California.

8. Plaintiff ngmoco is informed and believes, and on that basis alleges, that Gameloft has engaged in continuous and systematic business in California and within this judicial district, by, *inter alia*, distributing or authorizing the distribution of video games, and selling or authorizing the sale of the video games in this judicial district. Upon information and belief, Gameloft has a corporate office within this judicial district at 625 Third Street, San Francisco, California, 94107.

GENERAL ALLEGATIONS

NGMOCO and Its Topple Video Games

9. Plaintiff ngmoco is a developer, publisher and distributor of video games and other software compatible with Apple Inc.'s iPhone and iPod Touch products. Plaintiff ngmoco has created several highly successful iPhone games, including Maze Finger, Topple, Topple 2 and Rolando.

10. There are many genres of video games, including shooters, fighting, racing and

1 puzzle games. Each genre has its own distinct characteristics. The puzzle game genre, which is
2 associated with classic games such as Sudoku and Tetris, is defined by both theme and gameplay
3 style. Ubiquitous to the puzzle game genre are object stacking games, where a player must
4 organize and stack various objects, such as blocks or other shapes, to make a tower or other
5 structure that resists collapse. Success in the game depends on the height and stability of the
6 constructed tower and efficient use of the objects provided to the player by the game.

7 11. In October 2008, ngmoco released its object-stacking game "Topple" for the
8 Apple iPhone and iPod Touch devices and offered the game for sale via the Apple iTunes App
9 Store. In "Topple," a player must stack a family of variously shaped blocks using the iPhone's
10 controls to slide, rotate and drop the blocks into stacking position onto a foundational block
11 platform. As towers are constructed, the structure often teeters from side to side, indicating
12 possible collapse. Each block has a human-like face, with eyes and a mouth, that indicates its
13 stability or danger of falling from the structure by varying facial expressions.

14 12. Like all iPhone applications, Topple utilizes the iPhone's built-in controls. For
15 instance, Topple takes advantage of the iPhone's "accelerometer" – an electromechanical device
16 that detects the position and motion of the iPhone. In Topple, to prevent a tower from collapsing,
17 a player must tilt the iPhone to offset the direction of the teetering.

18 13. Although training and freestyle play modes are available, in the level mode of
19 Topple a player must construct a tower past a pre-determined height line within a certain time
20 limit to access a subsequent, more difficult level. Bonus points are awarded for a tower that
21 exceeds an even higher height line.

22 14. In March 2009, ngmoco released an updated version of Topple with enhanced
23 features, called "Topple 2." In addition to the gameplay of Topple, Topple 2 included new visual
24 backgrounds, four new game modes and the ability to challenge friends online in a "versus"
25 mode.

26 15. Both Topple and Topple 2 were independently created by ngmoco.

27 16. Aside from Topple and Topple 2, there are literally dozens of other video games
28 for the iPhone, PC and other platforms with the theme and purpose of stacking objects to make a

1 stable tower or structure. This includes, among many others, Tower Bloxx Deluxe 3D (iPhone
 2 game where player stacks building-shaped blocks to construct skyscrapers), Tiki Towers (iPhone
 3 game where player stacks bamboo and coconut shapes to build towers and bridges), Tower
 4 (iPhone game where player builds tower from layers of blocks by dropping blocks from
 5 horizontally moving block layers), Stack-Um (iPhone game where player stacks rows of blocks
 6 as high as possible in order to level up), and Super Stacker 2 (web-based game where player
 7 stacks various shapes of blocks to form a pre-determined structure). Moreover, outside of the
 8 video game realm, block stacking and tower-building games—such as Jenga—existed long before
 9 Topple or the Wonder Blocks game allegedly owned by Gameloft. In no sense is the theme,
 10 concept or idea of a block-stacking game to build a tower or structure original to Gameloft.

11 **Gameloft's Wonder Blocks Game**

12 17. Gameloft claims to be the exclusive owner of the copyright in a puzzle video game
 13 called "Wonder Blocks." Upon information and belief, Wonder Blocks is offered as a game for
 14 the mobile telephone (non-iPhone) platform, and has also been ported for use on Apple
 15 Computer's iPod device. The game is not compatible with the iPhone or iPod Touch devices.
 16 Upon information and belief, Gameloft claims that the Wonder Blocks game "challenge[s] [a
 17 player's] block-stacking talents and . . . sense of precision in a fight against time and instability."
 18 In the game, a player purportedly "overcom[es] challenges to rebuild marvelous structures, from
 19 the Egyptian pyramids to the Eiffel Tower." Upon information and belief, a player uses the
 20 buttons on a mobile telephone or the scroll wheel of an Apple iPod to move and rotate blocks into
 21 stacking position. A time limitation for stacking is denoted by a rising level of water threatening
 22 to engulf the tower.

23 **The Controversy Between The Parties**

24 18. In March 2009, shortly after Topple 2 was released, ngmoco received a letter dated
 25 March 19, 2009 signed by the general counsel of Gameloft, S.A. concerning the Topple and
 26 Topple 2 video games. In that letter, Gameloft stated its position that Topple and Topple 2
 27 infringe Gameloft's copyright in and to the Wonder Blocks game. As evidence of this alleged
 28 "infringement," Gameloft's letter pointed to alleged similarities in wholly unprotectable aspects

of the games, such as “build[ing] towers using blocks of various shapes and sizes;” the “presence of obstacles” and “simulation of the real physics of block collisions.” The letter even complained about the fact that Topple uses the iPhone’s built-in controls, identifying the “use of the accelerometer system to control the movement of the blocks” as evidence of alleged infringement. The letter also stated Gameloft’s position that “NGMOCO’s actions constitute copyright infringement . . . and subject [it] and [its] distributors to a variety of damages and penalties. . . .” The letter further demanded that ngmoco (1) immediately cease all “use, development, display, distribution, and advertising” of Topple and Topple 2 and similar games, (2) provide Gameloft with a list of third party distributors of Topple and Topple 2, (3) provide an accounting of revenues and profits from Topple and Topple 2, and (4) agree in writing not to develop games or applications similar to Wonder Blocks or Gameloft’s other games or copyrighted material.

19. In the March 19, 2009 letter, Gameloft specifically noted that if ngmoco failed to comply with its cease and desist demands by March 27, 2009:

Gameloft will initiate all over the World, any and all necessary proceedings and action including judiciary permitting to enforce and protect its rights.

20. The explicit threat of litigation described above has created in ngmoco a reasonable apprehension of imminent suit by Gameloft for copyright infringement relating to the Topple and Topple 2 games.

FIRST CLAIM FOR RELIEF

(Declaratory Judgment – No Copyright Infringement: 17 U.S.C. § 501)

21. Plaintiff ngmoco incorporates by reference all the allegations of paragraphs 1 through 20, inclusive.

22. This Claim is brought pursuant to 28 U.S.C. §§ 2201 and 2202. An actual controversy presently exists between ngmoco and Gameloft, regarding ngmoco’s Topple and Topple 2 video games, particularly whether the video games infringe Gameloft’s alleged copyrights. In the letter dated March 19, 2009 sent to ngmoco, Gameloft contends that the Topple video games infringe Gameloft’s copyrights. Gameloft has further demanded that

1 ngmoco immediately cease and desist selling the Topple and Topple 2 video games.

2 23. Plaintiff ngmoco contends that the Topple and Topple 2 video games were
3 independently created and do not directly or indirectly infringe any copyrights owned or held by
4 Gameloft relating to Wonder Blocks.

5 24. Plaintiff ngmoco hereby requests a declaration of this Court under the provisions
6 of the Declaratory Judgment Act, 28 U.S.C. § 2201, setting forth the respective rights and other
7 legal relations of ngmoco and Gameloft. In particular, ngmoco requests a declaration that the
8 Topple and Topple 2 video games do not directly or indirectly infringe Gameloft's copyrights (if
9 any), so that there will be no controversy clouding ngmoco's right to continue distributing the
10 Topple and Topple 2 video games.

11 25. Because of Gameloft's actions and threats described herein, ngmoco has a
12 reasonable and strong apprehension that it and/or related third parties will soon be faced with a
13 copyright infringement suit brought by Gameloft. Accordingly, an actual controversy has arisen
14 and exists between ngmoco and Gameloft within the meaning of 28 U.S.C. § 2201.

15 **PRAYER FOR RELIEF**

16 THEREFORE, ngmoco prays for judgment against Gameloft as follows:

17 A. Plaintiff ngmoco requests a declaration that ngmoco has not infringed any
18 copyrights owned or held by Gameloft related to the Wonder Blocks game;

19 B. Injunctive relief restraining Gameloft, its agents, licensees, servants, employees,
20 successors, and assigns, and all others in concert and privity with them, from bringing any lawsuit
21 or threat against ngmoco or any other person or entity for copyright infringement in connection
22 with the development, marketing, or distribution of the Topple and Topple 2 video games;

23 C. An award of the costs, expenses, and attorneys' fees incurred by ngmoco herein
24 pursuant to pursuant to 17 U.S.C. § 505; and

25 //

26 //

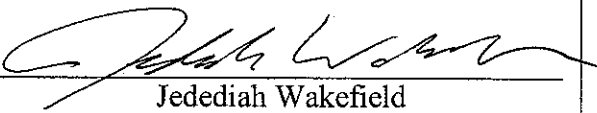
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1 E. Such other and further relief as the Court deems proper and just.

2
3 Dated: March 30, 2009

FENWICK & WEST LLP

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5 By: 
Jedediah Wakefield

6 Attorneys for Plaintiff NGMOCO, INC.
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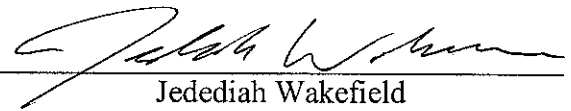
DEMAND FOR JURY TRIAL

Plaintiff ngmoco hereby requests a trial by jury of all issues so triable.

Dated: March 30, 2009

FENWICK & WEST LLP

By:


Jedediah Wakefield

Attorneys for Plaintiff NGMOCO, INC.

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